United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

668

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

No. 23041

CHARLES E. WHITE,

Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. May a prior conviction of attempted housebreaking be introduced to impeach a criminal defendant's credibility in a subsequent trial for completely independent offenses?

2. May a prosecutor, during final argument to the jury, express his personal opinion as to ultimate facts to be found by the jury?

3. Must the court grant a mistrial when it unjustifiably criticizes defense counsel in the jury's presence?

4. Must the court order a mistrial if the jury foreman renders a confused verdict?

STATEMENT PURSUANT TO GENERAL RULE 8(d)

This case has not previously been before this Court under the same or a similar title.

REFERENCES TO RULINGS

Trial Transcript, Pages 3-8.

Trial Transcript, Pages 234, 235, 246, 247.

STATEMENT OF THE CASE

Appellant (hereinafter called White) was arrested and indicted for unauthorized use of a motor vehicle (22 D.C. Code 2204) and assault upon

a Metropolitan Police officer with a deadly and dangerous weapon (22 D.C. Code 505(b)). White pleaded not guilty to each count of the indictment. After a trial before a jury, he was found guilty of unauthorized use of a motor vehicle, not guilty of assault upon a Metropolitan Police officer with a deadly and dangerous weapon and guilty of the lesser included offense of assault upon a Metropolitan Police officer. This appeal followed.

James W. McGinnis (hereinafter called McGinnis), a Metropolitan Police officer, testified that on May 24, 1968, he was assigned to the Special Operations Division, Canine Division, patrolling in the area bounded by 14th, 16th, S and Q Streets, N.W., in the District of Columbia. (Tr. 76, 77). About 8:30 or 8:45 P.M., he was walking through an alley. (Tr. 79). It was getting dark and rain was falling. (Tr. 79). He stopped beneath an overhang. (Tr. 79). While under the overhang, he observed a green Pontiac turn off R Street and attempt to make a turn into the alley. (Tr. 80). The vehicle struck a retaining wall with its right fender and McGinnis walked toward it. (Tr. 80). He observed the operator attempt to back on to R Street, but stop because he was prevented from doing so by traffic proceeding on R Street. (Tr. 80). The operator, whom McGinnis identified as White, got out of the vehicle and began to look at the damage. (Tr. 80). McGinnis approached White and asked him if the vehicle was his to which White responded in the affirmative. (Tr. 81, 82). McGinnis then asked White for his permit and registration. (Tr. 82).

White attempted to re-enter the vehicle on the operator's side, but McGinnis prevented him from doing so saying that White would first have to produce his permit and registration. (Tr. 82). White appeared to be taking a wallet from his pocket and then swung his arm at McGinnis knocking him off balance. (Tr. 82). McGinnis grabbed White and the two of them fell to the ground and grappled in the alley. (Tr. 82, 83). White attempted to hit McGinnis with McGinnis' flashlight. (Tr. 84). McGinnis, during the altercation, managed to radio for assistance. (Tr. 83). Shortly afterward, additional police officers arrived on the scene after which White was placed under arrest. (Tr. 84, 131, 162).

White testified that at the time in question he was preceeding, on foot, to attend a party at 1305 R Street, N.W. (Tr. 183, 184). On the way he met a girl about five or six blocks from the 1300 block of R Street. (Tr. 184, 185). While they were walking west on R Street, the girl called his attention to a fight in an alley. (Tr. 185, 186). They proceeded into the alley and found several people standing around three persons scuffling on the ground. (Tr. 186). White told two of the participants to stop beating the third. (Tr. 186). White reached down and pulled one by the shoulder. (Tr. 186). An unidentified person struck White on the head dazing him. (Tr. 188). He then heard someone announce the arrival of the police and he was apprehended. (Tr. 188). He denied having a driver's

permit, driving or being inside the Pontiac, taking the vehicle, striking McGinnis or grabbing McGinnis' flashlight. (Tr. 191. 192).

ARGUMENT

I. Fact Of Prior Conviction For Attempted Housebreaking Is Inadmissible As Evidence In Subsequent Trial For Completely Independent Offenses

By statute, 14 D.C. Code 305, "the fact of conviction may be given in evidence to affect" a person's "credibility as a witness." Interpreting that statute, this Court has ruled that

> . . .The trial court is not required to allow inpeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of sound judicial discretion to play upon the circumstances as they unfold in a particular case . . . Luck vs. U.S. (1965), 121 U.S. App. D.C. 151, 348 F2d 763.

In exercising its discretion, the trial court should consider the nature of the prior crimes, the length of the defendant's criminal record, the age and circumstances of the defendant and, primarily, the extent to which it is more important for the jury to hear the defendant's story than to know of prior convictions. Luck vs. U.S. (supra) When admissibility of a prior conviction is at issue, the trial court should consider that

> . . .In common human experience acts of deceit, fraud, cheating, or stealing, for

> example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not. . . Gordon vs. U.S. (1967), 127 U.S. App. D.C. 343, 383 F2d 936.

In this case, White presented an alibi defense. Looking at the evidence in a light most favorable to the prosecution, only Officer McGinnis and White witnessed White's operation of the automobile and the subsequent events which led to their grappling in the alley. Thus credibility was crucial to both prosecution and defense, as, indeed, the trial court recognized. (Tr. 7, 8). At a conference out of the jury's presence, the Court ruled, over White's objection, that the government would be permitted to introduce White's 1963 conviction of attempted housebreaking. (Tr. 6-8). It was characterized by the Court as a crime of dishonesty, thus relating to credibility. (Tr. 7). Upon cross examination, the first question posed by the prosecutor to White involved his 1963 conviction for housebreaking. (Tr. 194, 195). In final argument the prosecutor reminded the jury about that conviction to fortify his claim that White's credibility was certainly questionable. (Tr. 228, 229). Thus, confronted with opposing testimony by the only two witnesses to the incidents which led to White's arrest, it is reasonable to assume that the

juror's heavily weighted the fact of the 1963 attempted housebreaking conviction, despite the Court's precautionary instruction that they were to consider it only insofar as White's credibility was concerned. (Tr. 235). As Judge McGowan has observed, it is a hollow pretense

> that juries can and do heed the formal instruction that they must regard the prior criminal conviction as relevant only to appellant's propensity to tell the truth than to commit crime. Blackney vs. U.S. (1968), 130 U.S. App. D.C. 87, 397 F2d 648.

Former 22 D.C. Code 1801, Act of March 3, 1901, Ch. 854, §823, 31 Stat. 1323, in effect at the time White was convicted of attempted housebreaking, defines conduct which is punishable thereby. It requires as an essential element of the crime an intent "to break and carry away" or "to commit any criminal offense." 22 D.C. Code 103 prohibits, among other conduct, an attempt to commit housebreaking. By its terms, breaking and entering with the intent to commit crimes of violence, as well as those characterized as deceitful, fraudulent, or dishonest, is unlawful. In determining whether to admit the fact of White's 1963 conviction of attempted housebreaking, the Court failed to consider whether, in view of former 22 D.C. Code 1801, the conviction rested on dishonest conduct or that which has been characterized by this Court in Gordon vs. U.S. (supra) as violent or assaultive. Indeed the record before the Court did not reveal the objective of White's attempted housebreaking.

Additionally, because the Court instructed the jury that it was entitled to infer from White's possession of the vehicle that he had taken it (Tr. 257-259), admission of the fact of his prior conviction was highly prejudicial, especially because he denied having taken it. As this Court has stated

> . . .where inferences founded upon unexplained acts are likely to be heavily operative, the court's discretion to let the jury hear the accused's story, unaccompanied by a recital of his past misdeeds, may play an important part in the achievement of justice . . . Smith vs. U.S. (1966), 123 U.S. App. D.C. 259, 359 F2d 243.

Consequently, in view of the posture of the direct evidence, the impossibility of characterizing White's prior conviction for attempted housebreaking and the prejudicial inference to which he was subjected, the trial court erred in ruling that the fact of the prior conviction was admissable in evidence.

II. Prosecutor May Not, In Closing Argument To The Jury, Express His Personal Opinion On The Ultimate Issues

The prosecutor is prohibited from expressing his personal opinion on the ultimate issue to be determined by the jury in order that the focus of the trial may be kept on the evidence and to eliminate the need for opposing counsel to meet 'opinions' by urging his own contrary opinion.

Harris vs. U.S. (1968), 131 U.S. App. D.C. 105, 402 F2d 656. In Harris, this Court condemned such statements of the prosecutor as:

> I ask you to reject it in toto the defense of John Harris because it reeks of fabrication, it lacks merit, it is not reasonable.
>
> He (Harris) would urge upon you that his defense is that he took this car in innocence (sic) but mistaken belief that he had the consent of the owner. If you really believe that, then he is pulling the wool over your eyes.
>
> Reasonably, there is a total fabrication, I would submit, ladies and gentlemen, it is a lie.

Commenting on those statements, this Court observed

> The prosecutor is certainly free to strike hard blows at witnesses whose credibility he is challenging. But what he may not do is direct the focus of the jury's consideration of the case from the facts in evidence to the attorney's personal evaluations of the weight of the evidence. The personal evaluations and opinions of trial counsel are at best borrowed irrelevancies and a distasteful cliche-type argument. At worst, they may be a vague form of unsworn and irrelevant testimony.

See also Gibson vs. U.S. (1968), 131 U.S. App. D.C. 163, 403 F2d 569.

During the course of his closing argument to the jury in this case, the Assistant United States Attorney made the following statements:

> I think from the evidence, you will also reasonably conclude the defendant knew he had no business there, knew the car was stolen, and knew he was about to get himself caught in possession of a stolen car. (Tr. 224).

. . .I suggest to you that the evidence before you reflects that you should not believe it (White's story). (Tr. 229).

I suggest to you that the evidence before you reflects that the defendant's story to you is simply an abuse of your ordinary common sense if you are to accept the defendant's statement . . . (Tr. 229).

He can't drive an automatic transmission. He never tried. Ridiculous . . . (Tr. 230).

. . .There wasn't anybody left in the alley. That's what he (White) told you.

Is that probable? Is it likely that it happened that way? Not really. (Tr. 231, 232).

It's (police conduct) no conspiracy, ladies and gentlemen. That's the way it happened. (Tr. 232).

In each instance, the prosecutor attempted to withdraw from the jury its right and responsibility to decide White's guilt or innocence. His repeated expressions of personal opinion in that regard prejudicially denied White of his right to trial by jury.

III. Unjustified Criticism Of Defense Counsel In Jury's Presence Is Prejudicial And Requires Grant Of Mistrial

During his closing argument to the jury, White's counsel attempted to argue the impact upon White's credibility of his prior conviction for attempted housebreaking. (Tr. 234). He was responding to the prosecutor's

closing argument during which that conviction was raised as a major reason for discrediting White's testimony. (Tr. 229). The Court admonished White's counsel for unfairly commenting upon the conviction and directed him to talk about the facts of the case, leaving the law to the Court. (Tr. 234). White's attorney protested that he had not misstated the law, to which the Court responded, "all right. Go ahead, but just watch your step." (Tr. 235). At the conclusion of closing arguments, White's attorney protested the Court's reprimand in the jury's presence, claiming that it was prejudicial to his client. (Tr. 246). He asked for a mistrial, which was denied. (Tr. 246, 247).

The Court claimed that counsel commented upon and misstated the law, but admitted that he may have misunderstood counsel. (Tr. 247). The Court then stated, "If I am wrong, I am sorry. I will try to correct it as I go along in the charge." (Tr. 247). Counsel's comments upon which the Court seized could not be fairly characterized as unfair. If anything, the Court's criticism should have been properly directed at the prosecutor who had engaged in the very conduct for which White's attorney was reprimanded.

In Grock vs. U.S. (1923), 53 App. D.C. 146, 289 F 544, this Court held

> . . .It is an important rule that an attorney at law appearing in open court in the trial of a case is entitled to such treatment from

> the court that the interests of his client may not be prejudiced. This is not a matter of indulgence, but of right . . .

Here, the Court unjustly criticized and reprimanded White's counsel while he was properly commenting upon a fact vital to the defense of his client --- the prior attempted housebreaking conviction. The Court's reprimand, delivered in the jury's presence, might easily have swayed the jurors insofar as the weight they attached to that conviction. The Court's charge to the jury does not reveal any specific attempt to overcome the prejudicial effect which its reprimand may have had on the jury.

IV. Jury Foreman's Equivocal Rendition Of Verdict Requires Mistrial

In announcing the verdict, the foreman announced that the jury had found White not guilty of assault on a member of the police force with a dangerous weapon. (Tr. 273). As to the lesser included offense of assault on a member of the police force without a dangerous weapon, the foreman responded, "We find the defendant guilty of simple assault." (Tr. 273). The clerk's repetition of that verdict was affirmed by the jury. (Tr. 274). The Court, at a bench conference, stated that there was a misunderstanding in the verdict and that White was either guilty of assault on a member of the police force or not guilty. (Tr. 274). He then instructed the jury as to the form in which their verdict must be rendered

stating "what remains now in this case is: Is he or is he not guilty of assault on a member of the Police Force without a dangerous weapon? That is what you have to decide . . . Do you understand?" The foreman then stated: "I understand what you said. I heard you, Judge, but---." (Tr. 275). However, the foreman was unable to complete his statement because the Court again proceeded to explain to the jury the form its verdict must take. White's counsel then asked for a mistrial claiming that the juror's had found, by returning a verdict of guilty of simple assault, that McGinnis was not a member of the police force. (Tr. 276-278).

Nowhere in the record is there any evidence that McGinnis identified himself as a police officer to White. The record is replete with references to items of police equipment or apparel, but there is no evidence that it would or could be identified as such by a citizen. This incident occurred at approximately 8:30 P. M. on May 24, 1968. (Tr. 79). It was getting dark and rain was falling. (Tr. 79). The vehicle White was allegedly operating entered the alley with its headlights on. (Tr. 116). Thus, the jurors might reasonably have concluded that McGinnis' status as a police officer was not known to White, and the verdict of guilty of simple assault may have reflected their attempt to announce that fact.

CONCLUSION

For the foregoing reasons, the conviction should be reversed and the case remanded to the United States District Court for a new trial.

Respectfully submitted,

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